IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 352

GENERAL MOTORS CORPORATION, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY TO COUNTER-STATEMENT OF THE CASE

Respondent devotes 17 pages (Br. pp. 2-19) to a paraphrase of the lengthy stipulation of facts and exhibits thereto (R. 260-371), apparently hoping by mere volume of words to impress the Court with the extent of the petitioner's District activities.[1] The verbiage

[1] The paraphrasing has produced some inaccuracies. If the details are considered material, the stipulation itself should be consulted.

adds nothing of substance to the facts as summarized in our brief, pp. 4-6, 7-8, and tends to obscure the fact that, with very minor exceptions (see Pet. Br. p. 5, note 2), the zone offices concerned with car, truck and coach sales (accounting for approximately 95% of the net income sought to be taxed (R. 377-380)) were located outside the District. The zone office activities described at length by respondent were performed outside the District by personnel based outside and residing outside, except for the regular visits to dealers by the "district managers" and the less frequent and irregular visits by higher level personnel, as will appear from the record references to which respondent refers. It is wholly irrelevant that the zone offices "were located within the Washington Metropolitan Area" (Resp. Br. 5-6), the only facts of legal significance being that they were not located in the District and their personnel did not reside here. The zones covered large territories (Maryland, Virginia, and variously parts of other states) of which the District was only a small part, and many dealers of whom only a few were in the District (e.g., the Pontiac zone had 120 dealers of whom only four were in the District (R. 262)).

The several small offices in the District (R. 285-306) either had no selling function at all or were involved with only an insignificant fraction of the District sales here taxed (R. 377-380). Those offices undoubtedly contributed generally to the production of petitioner's income, but their contribution is not measured by the amount of District sales. Their presence had no bearing on the assessments and their activities were not taxed. The lengthy description of these offices serves merely to emphasize the illogic of respondent's regula-

tion and its application. By including their property and payroll in the fraction numerators, the Tax Court taxed all those activities in direct proportion, a result which is not only eminently just but expressly required by the statute.

The lengthy description (Resp. Br. 3-5) of the Dealer Selling Agreement adds nothing to the controlling facts. What the dealers are required to do does not explain what petitioner does, nor, more importantly, where it does it.

We do not agree with respondent's analysis of the expert testimony and we sharply dissent from its statement that the Tax Court made no findings based on that evidence (Resp. Br. 19-21, 55-64), a matter fully treated *infra*, pp. 21-27.

Respondent suggests that because the District's formula assessed only about four-tenths of one percent of petitioner's total net income, the assessments are reasonable. That is obviously the wrong comparison and a complete *non sequitur*. The amount of income which petitioner earned outside the District has no bearing whatever on the amount of tax due the District (except that such income must be excluded from the District tax base). As clearly established by the stipulated facts and the expert testimony, respondent assessed 100% of the income derived from the entire process of manufacture and sale, almost entirely outside the District, to customers within the District, and *eleven times* the income attributable to activities within the District (Pet. Br. 43). These two figures —100% and eleven times—are the relevant ones; the four-tenths of one percent has no relevancy.

The statement on page 21 of respondent's brief that the Tax Court refused to follow petitioner's experts'

recommendation of a two-factor formula (property and payroll, measuring capital and labor) is misleading. Petitioner did not request a two-factor formula. Although it is clear that only a two-factor formula makes any economic sense, which is what the experts testified, petitioner raised no objection to the use of three factors because the states (Michigan, Delaware and Maryland) in which petitioner manufactures most of its products sold to District customers include a sales factor, and hence omitting it from the District formula would permit roughly a third of petitioner's income from that business to escape tax. Petitioner has no such ambition, and requested a three-factor formula, as applied by the Tax Court, to assure that 100% of its income, no more and no less, would be taxed.

It is petitioner's position that the contribution of its business activities in the District to its total net income cannot be gauged by mere verbal description of the activities, but only by a quantitative measure which takes into account the relative value of the activities elsewhere which likewise contributed to such income; and that this is best achieved by applying ratios reflecting the costs of the services applied in the different jurisdictions and the relative capital investments (Pet. Br. p. 42).

ARGUMENT

I. THE ASSESSMENTS ARE CONTRARY TO THE STATUTE

The Force of the Decision Below

Respondent devotes little argument (Resp. Br. pp. 25-26, 41-42) to supporting the determination of the court below that "the statute clearly permits, although it does not require, the single factor sales formula adopted by the Commissioners" (R. 515). Since peti-

tioner has dealt fully with that question in its opening brief (pp. 12-27), little need now be added to that discussion.

Respondent attempts to preclude this Court from deciding the statutory question by the assertion (Resp. Br. p. 42) that "When it construes an act of Congress of local application the United States Court of Appeals for the District of Columbia Circuit occupies a position identical with that of the highest court of a state", and hence that "the interpretation of a statute by [that court] becomes a part of the statute for purposes of determining its validity." Respondent overlooks a very important distinction. Whereas this Court is bound in most circumstances to accept a state court's construction of its own statutes (*Guaranty Trust Co.* v. *Blodgett,* 287 U.S. 509, 513; *cf. Atlantic Coast Line* v. *Phillips,* 332 U.S. 168, 170), this Court's reluctance "ordinarily" to review decisions of the Court of Appeals based upon statutes confined in their operation to the District of Columbia is a matter of certiorari policy (*Del Vecchio* v. *Bowers,* 296 U.S. 280, 285) and deference to the local court (*Griffin* v. *United States,* 336 U.S. 704, 718). It is not a question of power, as this Court has frequently demonstrated by reversing determinations of District law by the Court of Appeals.[2] Particularly where the statutory ques-

[2] *District of Columbia* v. *Murphy,* 314 U.S. 441, 449-458, *reversing* 73 U.S. App. D.C. 345, 119 F. 2d 449; *Lynch* v. *Overholser,* 369 U.S. 705, 710-720, *reversing* 109 U.S. App. D.C. 404, 288 F. 2d 388; *Carroll* v. *United States,* 354 U.S. 394, 408-415, *reversing* 98 U.S. App. D.C. 244, 234 F. 2d 679; *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100, 112-113, *reversing* 92 U.S. App. D.C. 34, 203 F. 2d 579; *Loughran* v. *Loughran,* 292 U.S. 216, *reversing* 62 U.S. App. D.C. 292, 66 F. 2d 567; *Washington Fidelity Nat. Ins. Co.* v. *Burton,* 287 U.S. 97, *reversing* 61 U.S. App. D.C. 3, 56 F. 2d 300.

tion is "enmeshed with constitutional issues", this Court has not hesitated to make its own determination of District law. *District of Columbia* v. *Little,* 339 U.S. 1, 4, n. 1. The present controversy clearly calls for such a determination by this Court, since the construction given to the statute by the Court of Appeals permits an unconstitutional result.

The Structure of the Statute

Respondent itself shows no such deference for the construction of the statute by the court below, for the main thrust of respondent's statutory argument is not that the Commissioners were empowered to adopt *either* a single-factor or a three-factor formula, as the Court of Appeals held, but that the adoption of *any* other formula than the single-factor sales formula would violate the statute by creating an unauthorized partial exemption of income (Resp. Br. pp. 27-36).[3] This position appears to be based on two grounds: (1) that, irrespective of whether some portion of income from sales to District customers might be determined not to be "fairly attributable" to District business, the tax reaches such amount as "other income . . . derived from sources within the District"; and (2) that Congress expressed its full intention with regard to the exemption of out-of-District corporations in the 1948 amendments to the Act, and any further "exemption" is unauthorized by the statute. We discuss these points in turn.

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[3] The court below, in sustaining respondent's regulations, did not take any such sweeping position, but declared that the three-factor formula (which respondent says creates an unlawful exemption) could be used if the Commissioners chose to adopt it (R. 525-526).

Section 47-1580 of the District of Columbia Code (Pet. Br., App. B, pp. 31a-32a) reads in pertinent part as follows: "The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District. . . ." Respondent repeats (Resp. Br. 33-36) the argument, rejected by the Court of Appeals, that any "portion" of the income from sales to District customers which might be determined, by some formula, not to be "fairly attributable" to District business then falls into the category of "other income", and is taxed by reference to its "source" in the District customer. However, the statute is correctly analyzed by the Court of Appeals in *District of Columbia* v. *Evening Star Newspaper Co.,* 106 U.S. App. D.C. 360, 366-367, 273 F. 2d 95, 101-102, which held that the quoted provision recognizes two separate and mutually exclusive "net incomes", one operating, the other non-operating. *Non-operating* income (dividends, interest, rentals, etc.) is allocated entirely to its "source". *Operating* income, on the other hand (unless the business is carried on entirely within the District), is "deemed to be income *from sources within and without* the District," and "the *portion* thereof subject to tax" is required to be determined by a proper apportionment formula,[4] "depending upon the source or activity which produced it."[5] Respondent would say that the portion of oper-

[4] D.C. Code 1961, § 47-1580a (Pet. Br. App. B, pp. 32a-33a) (emphasis added).

[5] *District of Columbia* v. *Evening Star Newspaper Co., supra,* 106 U.S. App. D.C. at 367, 273 F. 2d at 102.

ating or business income which is apportioned to "sources . . . *without* the District", is nevertheless taxable as "other income" from sources *within* the District. Such an argument disregards the structure of the statute and renders meaningless the requirement of apportionment.[6]

Respondent also refers (Br. pp. 29-31) to the 1948 amendments to the Income and Franchise Tax Act which were enacted to relieve certain corporations of the burden of filing returns and paying any tax at all if they had no regular business establishment in the District and their District contacts were confined to solicitation and the like. Respondent then argues (Br. pp. 32-34) that any apportionment formula "which would have the effect of exempting" any part of the income realized through sales to District customers, unless embraced within those exemption provisions, "would be at variance with the intent of the Congress." The argument is that because some taxpayers are expressly 100% exempt, others are impliedly 100% taxable. This confuses the question of the reach of the tax with the measure of the tax. The amendments exempted certain corporations but did not alter the *measure* of the tax for those corporations which remained subject

[6] As respondent acknowledges (Br. pp. 35-36), the court below dismissed respondent's argument in a footnote (R. 512-513, n. 16), referring to its *Evening Star* decision, *supra*, and declaring that respondent's position "would result in an overlap of the two provisions not called for by the taxing scheme." It is true, as respondent points out (Br. p. 36), that the court's view on this issue took nothing from the District, since the entire income in question was held taxable under the "fairly attributable" clause. But if, as petitioner contends, the court below erred on how much is "fairly attributable", the "other income" clause does not make taxable any portion which is properly apportioned to activities outside the District under the "fairly attributable" clause.

to it,[7] which continued to be that *portion* of the net income which is "fairly attributable" to business "carried on" in the District.[8] Excluding the portion not so attributable is exactly what the statute calls for and is in no sense an "exemption".

Legislative History

Respondent (Br. p. 27) also challenges petitioner's statement (Pet. Br. p. 27) that nothing could be found in the legislative history to support the theory of the statute adopted in the Commissioner's regulations. Respondent puts forward the contentions (1) that "an apportionment formula utilizing sales" had been employed under the present and previous revenue acts and had been repeatedly sustained (Resp. Br. pp. 26-27), and (2) that Congress has repeatedly amended the present statute without indicating disapproval of the regulations. Let us examine those contentions (Resp. Br. p. 34).

The first point is essentially the contention which was anticipated and discussed at pages 25-27 of petitioner's opening brief, to which little need be added.[9]

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[7] The situation giving rise to the amendments was precisely analogous to that which prompted Congress, a decade later, to enact Public Law 86-272, 73 Stat. 555 (15 U.S. Code §§ 381-384), after this Court held, in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, that certain minimal contacts gave the states jurisdiction to levy an apportioned net income tax on local activities of outside concerns. See the Committee Reports on the 1948 amendments, quoted in Resp. Br. pp. 31-32. Respondent's argument would now attribute all of Northwestern States' income to Minnesota, instead of the "fairly apportioned" part approved by this Court, merely because in the meantime Congress has prohibited any tax in some other circumstances.

[8] D. C. Code 1961, §§ 47-1571, 47-1580.

[9] The contention is also answered in the Tax Court's opinion, R. 447-450.

With one exception, the cases cited by respondent involved different statutes and are no authority for interpretation of the Income and Franchise Tax Act of 1947. The exception is *Smoot Sand and Gravel Corp.* v. *District of Columbia,* 104 U.S. App. D.C. 292, 261 F. 2d 758, cert. den., 359 U.S. 968, where the taxpayer's attack on the present regulation failed for an asserted lack of proof that its producing activities contributed anything to its net income. There is no such lack of proof here. A case not cited by respondent is the latest, *Broadcasting Publications, Inc.* v. *District of Columbia,* 114 U.S. App. D.C. 163, 313 F. 2d 554 (discussed at pp. 23-24 of our main brief), which held all the taxpayer's income attributable to its producing activities and none to the locale of its customers.

Panitz v. *District of Columbia,* 74 U.S. App. D.C. 284, 122 F. 2d 61, applied the 1937 Act which imposed a tax not measured by income at all but upon the unapportioned "gross receipts from any business in the District of Columbia". *Eastman Kodak Co.* v. *District of Columbia,* 76 App. D.C. 339, 131 F. 2d 347, construed the 1939 net income tax law and attributed income to the place "where the sale is made". *Electric Storage Battery Co.* v. *District of Columbia,* 81 U.S. App. D.C. 135, 155 F. 2d 867, added that the place where the sale is made is where title passes, a test which Congress later wrote into the statute itself.[10] In *Eastman Kodak,*

[10] Act of June 22, 1942, 56 Stat. 376, ch. 433 (D.C. Code 1961, § 47-1502(b)). In pointing out here and elsewhere (pp. 14, 29, *infra;* Pet. Br. 33-34, 45-48, App. 57a) that the title test and others (other than three-factor formulae) involved in the decided cases would, if applied here, assign almost no income to the District, we are not suggesting that one test is bad merely because another results in less tax. We say that a decision which upholds a test producing very little tax cannot be authority for a different test producing a very large tax.

the Court of Appeals conceded that: "It may be true, as petitioner contends, that from the economic point of view a *large portion* of the income in question is *attributable* to activity which took place outside the District", 131 F. 2d at p. 348 (emphasis added), but it held that fact immaterial *under the 1939 Act.* When Congress changed from an income tax to a franchise tax in 1947, it repudiated the test which had assigned all income to the place of sale and passage of title and, borrowing the language of the Court of Appeals, directed that the tax be measured by the *portion* of net income "fairly *attributable* to any trade or business carried on or engaged in within the District", and added that income derived from business conducted within and without the District "shall be deemed to be income from sources *within* and *without* the District."[11] By that act, Congress completely destroyed the precedent value of the earlier cases.

The second branch of respondent's legislative history argument relies on the fact that the Income and Franchise Tax Act of 1947 has been amended seven times, which is urged as showing assent by silence to the District's apportionment methods. Respondent concedes, however, that none of the changes affected in any way the apportionment of income for franchise tax purposes. In fact, almost all of them dealt with problems peculiar to the income tax on individuals.[12]

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[11] D.C. Code 1961, §§ 47-1580, 1580a (Pet. Br., App. B, pp. 31a-32a) (Emphasis added).

[12] The Act of May 27, 1949, 63 Stat. 129, ch. 146, Title IV, increased individual rates, changed the definition of a resident individual, altered personal exemptions, amended certain provisions relating to deductions, and made other minor changes. The Act of May 18, 1954, 68 Stat. 117, ch. 218, Title XII, raised individual rates. The Act of March 31, 1956, 70 Stat. 70, ch. 154, Title I,

In no instance was there a complete restudy or re-enactment of the statute as a whole, and there is no reason to suppose that Congress, addressing itself to narrow and particular problems, was made aware of the regulation on an entirely different question.[13]

The rule that Congress is presumed to have approved the administrative construction of a statute which it amends or re-enacts without change applies only where "the relevant statutory provision" has been so amended or re-enacted,[14] not where provisions re-

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raised individual rates, altered personal exemptions and the standard deduction for individuals, imposed a requirement of withholding from individual wages, and required a license of certain persons not subject to the unincorporated business tax. The Act of September 4, 1957, 71 Stat. 605, Pub. L. 85-281, provided additional personal exemptions for old age and blindness, exempted Social Security and veterans' benefits from tax, changed the standard deduction, and amended the license provision. The Act of June 27, 1960, 74 Stat. 219, Pub. L. 86-522, did no more than exempt alien employees of international organizations. The Act of March 2, 1962, 76 Stat. 10, Pub. L. 87-408, changed only the due date of the tax.

[13] *Cf. United States* v. *Calamaro,* 354 U.S. 351, 358-359; *Mitchell* v. *Comm'r,* 300 F. 2d 533, 538 (4th Cir.).

[14] *Farmers Educational & Cooperative Union* v. *WDAY, Inc.,* 360 U.S. 525, 532-533 (cited by respondent) ("with full knowledge of the Commission's interpretation Congress has since made significant *additions to that section* without amending it to depart from the Commission's view"); *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535, 541, 546 (cited by respondent) (new statute "follows almost word for word the language *of* § *5(a)* of the earlier Act"); *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299, 307 (cited by respondent) (the provisions "*of* § *234(a)(9)* have been re-enacted without substantial change in the Revenue Acts of 1928 and 1932"); *N.L.R.B.* v. *Gullett Gin Co.,* 340 U.S. 361, 366 ("the provision with which we here deal"); *Wilmette Park District* v. *Campbell,* 338 U.S. 411, 417-8 ("the relevant language"); *Crane* v. *Comm'r,* 331 U.S. 1, 7-8 ("the relevant statutory provision"). (Emphasis added in quotations.)

motely connected to it (by being in the same Act) are amended.[15]

The only time respondent's apportionment regulations came to the attention of Congress was in connection with the 1948 amendments. However, if any significance can be attached thereto it supports, rather than weakens, our position. The regulations which were brought to Congress' attention at that time were very different in principle and in detail from those now in controversy. District officials presented and explained the regulations (promulgated November 28, 1947) at hearings before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia (relevant quotations from which, including the full text of the pertinent regulation, are set out in the Appendix, *infra*). The regulations provided for a rough apportionment by taxing only 50% of the income from a sale if title passed outside the District but the sale resulted from personal solicitation in the District or from a contract or order accepted in the District, and permitting consideration of other factors if sales alone produced an inequitable result. In explanation of those provisions, the Subcommittee was advised that the "intention [was] to allocate and apportion certain portions of the income of the taxpayer within the jurisdiction where the income is earned", as required by *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123, 131; and that "Because part of that profit was earned by the manufacturer (*sic*) and only part

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[15] In *Helvering* v. *Hallock*, 309 U.S. 106, 120-121, n. 7, the re-enactment rule was held inapplicable where the specific provision had not been amended or re-enacted, even though other language of the same section had been amended in relation to situations other than the one before the Court.

of it by the sale . . . half of the profit would be allocated to the District of Columbia and half elsewhere.'"[16] Presumably in reliance upon such representations, indicating that interstate sales into the District, by outside concerns with local offices, would not be unduly burdened, the Congress rejected a bill (H.R. 5317) which would have wholly exempted sales in which title passed outside the District, and adopted the Commissioners' substitute which confined the complete exemption to those with no local offices, warehouses or places of business.

In view of this history, we submit that it was the Congressional understanding that the apportionment formula give some weight to the places where the profit was earned and not arbitrarily assign 100% of the profit on all sales to the location of the customer, and that the wide differences between the regulations which were explained to Congress and those applied here deprive of any force the argument that respondent's present position received implied Congressional ap-

[16] Hearings p. 105 (Appendix, *infra*). The 1947 regulations did not follow that principle consistently, since they taxed 100% of the income if title passed in the District or if delivery was made from stocks in the District, apparently regarding such sales as intrastate transactions involving District source income. Whether or not that aspect of the regulation was impliedly approved by Congress, and whether or not it was violative of due process (Pet. Br. pp. 27-49), is no longer a matter of concern, since the regulations no longer make a distinction based on such considerations. Furthermore, we do not here have sales in which title passed or stocks of goods were maintained in the District (R. 261, 266, 268, 269, 270, 276, 280, 281, 295, 299, 504). Even the 50% rule probably would not have generated any but *de minimis* tax for the District under the facts of this case because petitioner does not ordinarily solicit orders nor accept orders in the District.

proval even in the 1948 amendments, five years before the present regulation was adopted.[17]

2. THE ASSESSMENTS ARE UNCONSTITUTIONAL

The District Commissioners Are Restrained by the Commerce Clause

In petitioner's brief (p. 49), it was stated that, while Congress itself may have power to impose burdens upon interstate commerce, including commerce between the states and the District, that power "cannot be treated as a mere matter of local concern, and committed to those immediately interested in the affairs of a particular locality." *Stoutenburgh* v. *Hennick*, 129

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[17] In the interim, the regulations went through several permutations, none of which, so far as appears, came to the attention of Congress. On August 31, 1948, the title test was discarded, and sales were required to be taken into account if "*principally secured, negotiated or effected* by owners, employees, officers and branches of the corporation *located* in the District" (emphasis added); a test which excluded sales not effected through some locally based agency. *District of Columbia* v. *Radio Corp. of America*, 98 U.S. App. D.C. 119, 232 F. 2d 376. Still another change was made on March 17, 1953, dropping the word "located" but retaining the requirement that the sales be "principally secured, negotiated or effected" in the District. *Id.*, 98 U.S. App. D.C. at 120, 232 F. 2d at 377. It was not until August 6, 1953 that the Commissioners adopted the test here in controversy, which (as construed by respondent) looks only to the location of the customer, without reference to the presence of any intra-District activity. The validity of that regulation, first in the *Smoot* case, *supra*, and then in this case, and in many cases held to await their outcome, has been in litigation almost ever since. In fact, in *District of Columbia* v. *Gallant, Inc.*, 110 U.S. App. D.C. 202, 290 F. 2d 745, it was held that the August 6, 1953 regulations failed to provide a valid and workable formula at all, and respondent once more tinkered with the regulation on July 14, 1961 (Pet. Br. App. B, pp. 34a-38a). See also *Broadcasting Publications, Inc.* v. *District of Columbia*, 114 U.S. App. D.C. 163, 313 F. 2d 554, which upheld the contention *made by the District* in that case that the location of the taxpayer's customers was irrelevant.

U.S. 141, 148.[18] Respondent argues (Br. pp. 40-41) that *Stoutenburgh* is inapplicable because the then governing body of the District was a legislative assembly instead of the present appointed commissioners. This is a distinction without a difference. The change in the form of government did not change the nature of the District of Columbia, which continued as a *municipal corporation* (D.C. Code 1961, § 1-102;[19] *District of Columbia* v. *Woodbury,* 136 U.S. 450, 452-455; *O'Toole* v. *United States,* 106 F. Supp. 804, 806-807 (D. Del.)) and was not thereby made an administrative department of the national government, sharing its sovereign powers and immunities. *Metropolitan R.R.* v. *District of Columbia,* 132 U.S. 1, 3-9. The District Commissioners have been granted limited legislative powers (see *District of Columbia* v. *John R. Thompson Co., supra,* 346 U.S. 100, 111, 114), including the power in this instance to "amplify" the statute (Resp. Br. p. 40) by prescribing formulas by regulations. Such powers are "legislative in character" (*Ilfeld* v. *Hernandez,* 292 U.S. 62, 65; *Union Electric Co.* v. *United States,* 158 Ct. Cl. 479, 486, 305 F. 2d 850, 853-854) and subject to all the restraints applicable to powers of local legislatures.

Congress itself did not prescribe the use of the single-factor sales formula, with its resultant burden on interstate commerce. The District Commissioners did. While it is undoubtedly true, as the Court of Appeals says (R. 515, 525-6), that the statute gives the Commissioners complete freedom of choice in legislating a

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[18] Cited with approval on this point in *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100, 107.

[19] Act of June 11, 1878, 20 Stat. 102, ch. 180, § 1.

formula, exercise of that freedom is subject to constitutional restraints. Municipal officials cannot use their delegated legislative powers in such manner as to burden interstate commerce.

Double Taxation Was Established

Respondent attacks the evidence on double taxation and argues that such proof is irrelevant (Br. 50-54). The record shows that the vehicles sold to District customers had been manufactured largely in Michigan, Maryland and Delaware; the computations and payments of taxes to such states; the statutes of such states; the tax returns there filed; the receipts and cancelled checks for the taxes there paid; and the identification of amounts of income attributed by respondent to such sales (R. 4-5, 13-19).

The printed record contains proof that (R. 4, 377-380):

1) $39,489.72 of the tax assessed for 1957 and $13,655.63 for 1958 was based on Cadillac automobiles manufactured in Michigan;

2) $8,667.01 for 1957 and $17,989.39 for 1958 was based on GMC trucks and coaches manufactured in Michigan;

3) $26,792.99 for 1957 and $10,037.92 for 1958 was based on Buick automobiles assembled in Delaware;

4) $40,590.63 for 1957 and $19,055.71 for 1958 was based on Oldsmobile automobiles assembled in Delaware;

5) $33,835.64 for 1957 and $12,145.79 for 1958 was based on Pontiac automobiles assembled in Delaware;

6) $100,591.40 for 1957 and $55,525.18 for 1958 was based on Chevrolet automobiles and trucks assembled in Maryland;

7) such taxes were computed by applying respondent's tax rate (5%) to 100% of petitioner's net income attributed by the District to the manufacture and sale of such vehicles (*e.g.*, R. 166-167, 172, 211, 214).

Not printed, but in the original record (R. 13-19, 125-126; Exhibits 9-21):

8) Michigan, Delaware and Maryland impose income-based taxes, apportioning income by three-factor formulae of property, payroll and sales (Pet. Br., App. B, pp. 38a-48a);

9) petitioner was required to and did pay to such states taxes so computed, in the amounts of $8,955,799.55 to Michigan and $510,792.31 to Maryland in 1957, and $6,940,309.50 to Michigan, $127,844.95 to Delaware and $271,425.25 to Maryland in 1958;

10) of the amounts so paid, a portion as shown on each return was based upon income attributed to the employment of property (principally the factories at which the vehicles sold to District customers were manufactured) in the respective states, a portion upon income attributed to the payroll (principally labor at those factories) in the respective states, and a portion (irrelevant here) upon income attributed to sales made to customers in the respective states. (Exhibits 9-21.)

What petitioner did not show is the portion of each tax payment to Michigan, Maryland and Delaware which was attributed to vehicles sold to District customers. In each instance, one more figure would have shown that: the total sales of the products of the re-

spective factory in the respective year. We know, for example, that Chevrolet had 1957 receipts from sales to District customers of $14,506,832 (R. 377). If we knew the total sales of Chevrolet's Maryland plant, we could apply a fraction to the known Maryland tax attributable to property and payroll and obtain a figure accurately representing the amount of tax paid to Maryland with respect to Chevrolet vehicles sold to District customers.

Unless the result of that computation were *de minimis*, and it certainly is not, its size is irrelevant. It is shown that Maryland taxed a very substantial portion of the income derived from the manufacture of every vehicle assembled at the Maryland factory, including those sold to District customers. Whether of the total Maryland tax of $510,792.31 the amount paid with respect to vehicles sold to District customers was $50,000 or $100,000 or $150,000 is irrelevant to the *fact* of double taxation and the constitutional invalidity of a formula designed to achieve it.

Actually, as demonstrated in our main brief (p. 52), the double taxation clearly appears from a comparison of the formulae themselves. When it is shown that the state in which production occurs attributes two-thirds of income to the factors of production, and the state of destination attributes all income to destination, the proof is complete.

The argument on p. 54 of respondent's brief—that we do not know the amount of income derived from that segment of petitioner's business culminating in sales to District customers—is circular. The computation complained of is respondent's own computation. That it reached 100% of the income from that segment of the business is obvious on the face of the computa-

tion and is supported by the testimony of all the experts, including those offered by respondent. Pet. Br. 15-22; R. 166-167, 172, 211, 214. The contention is, in effect, that separate accounting must be used, a contention which is unsound. *Butler Bros.* v. *McColgan,* 315 U.S. 501; Pet. Br. 38-40.

Based upon the foregoing, the Tax Court found double taxation *as a fact:*

Finding 3(b) (Pet. Br. App. 2a, R. 495):

> "A portion of the net income of petitioner derived from the segment of petitioner's business consisting of the manufacture of products without, and sale within the District of Columbia was taxed by the above mentioned states, pursuant to apportionment formulas (with factors of property, payroll and sales), as provided by their laws."

Finding 6 (Pet. Br. App. 3a, R. 496):

> "The method used by the assessing authority of the District attributed to the District 100 per centum of the net income derived by the petitioner from that segment of its business which consisted of the manufacture without, and the sale of products within the District."

It is obvious that such findings are fully supported by the evidence. Nothing more is required.

Respondent (Br. 53) wonders why only the District, and not the other states, is wrong. Respondent's witnesses, attempting to justify the District's single-factor destination-sales formula, pointed out that, if every jurisdiction used that same formula, 100% of petitioner's income, and only 100%, would be divided among the several jursidictions and taxed (R. 134, 193, 198). *Any* formula, consistently and universally

applied, will achieve one of the ideals of a formula: it will divide up the taxpayer's entire income without either duplication or omission. But if it is, as this one is, a wholly irrational formula, unrelated to actual values, income-producing factors, and costs of governmental services, it will result in depriving some states of their rightful revenues while permitting others to reach beyond their territories to take what does not belong to them. Michigan, Maryland and Delaware have quite properly taken the position that petitioner should pay taxes to them for services rendered to the plants and personnel within their borders. They cannot be expected to agree to forego all tax on that portion of the business culminating in sales to District customers merely because the District assigns it all to itself. The District must recede to a fair share.[20]

Excessive Taxation Was Established

Respondent bases its attack on our proof of excessive taxation primarily upon characterizations, with which we disagree, of the expert testimony and the Tax Court's findings of fact. (Resp. Br. 19-21, 55-64.) An attempt is made to weaken the testimony of petitioner's experts by asserting they disagree with each other. Not so, on any material point.

There was no disagreement whatever among petitioner's experts that income arises solely from the factors of production, that such factors can be measured by costs, that property and payroll are the most prac-

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[20] The District does not consistently follow any formula, selecting in each case the rationalization which produces the most tax. See our main brief, pp. 23-24, contrasting this case with *Broadcasting Publications, Inc.* v. *District of Columbia*, 313 F. 2d 554.

tical indicators of costs, that sales as such have nothing to do with it, that the District's formula attributed 100% of relevant income to the District, and that such attribution is unreasonable. See petitioner's brief, pages 41-43, for record references and analysis. Professor Morton added that it would not be unreasonable, theoretically, to assign certain costs, such as advertising, to the place where they take effect rather than where incurred—i.e., to the point of sale (R. 229-230). The items to which the point relates are relatively so small that the complication of dealing with them separately could not be justified by the change in results. Professor Paton and Mr. Powell conceded that, to the extent that activities occurred at the location of customers, a sales factor did no harm, being merely duplication (R. 40, 42-43, 77, 84), whereas Professor Studenski, pointing out that such activities were measured by property and payroll, could not approve a sales factor at all (R. 94, 97-98). Such minor differences detract nothing from the force of the unanimity on fundamentals—especially since there is no issue between the parties as to whether a sales factor should be used. The issue in the case is whether sales may be used alone, or whether it must be in conjunction with factors measuring the contribution of production.

Each of respondent's experts started out by responding "yes" to a hypothetical question as to whether the single-factor sales formula reasonably determined the income "fairly attributable" to the District (R. 129, 164, 189-190). When pressed on cross-examination, all conceded that manufacturing and other activities, as reflected in costs, were "one of the causes" of net income (along with, they said, the "activities" of the customers) (R. 171-175, 179, 194, 199-202, 204), al-

though one—Dean Baily—sought to avoid the obvious by a monumental quibble. He insisted that net income is not "attributable to" or "created" or "caused by" or "due to" those activities (R. 135-149), but that income is "created by the act of sale" (R. 142-143, 146, 148), although he had to recognize that those other activities "made possible" the product (R. 142-143, 147-148), without which he agreed there could be no sale and no income (R. 142, 148, 157-158). It is, he said, like a "three-legged stool . . . if you pull any one of them away . . ." (R. 145).

Professor Watson started out confidently but became embarrassed when he discovered the issue in the case. He explained his answer to the hypothetical by stating that every dollar of sales may reasonably be assumed to contain the same profit element as every other dollar of sales (R. 166, 172). Thus, he had answered the hypothetical as if it had been whether the single-factor sales formula reasonably determined the income "fairly attributable" to the products sold to District customers, which is quite different from income "fairly attributable" to the District. He said that capital and labor together with customer acceptance are "causes of net income" (R. 171), and that the income from products sold to District customers could not be attributed solely to activities in the District (R. 173). The sales factor alone, since it would attribute 100% of the relevant income to the District, would not comply with the statutory requirement that such income be deemed to be from sources within and without the District (R. 185).

Mr. Nathan stated that there were many factors in the production of income, and that the District's formula, in taxing 100% of the relevant income, did not

comply with the statute (R. 202, 206-207). He thought it was "fair" for the District to do that because the District has very little taxable industry of its own (R. 199). Asked if he did not think it unfair to assign to the District (and to other customer locations) all the income earned by the factories in Michigan to the deprivation of the latter state, he replied that Michigan could tax the businesses which sold to petitioner and its employes (R. 193).

Thus it appears, not only that petitioner's experts were in complete agreement on all essentials, but that respondent's witnesses agreed also on enough of them to establish the invalidity of the District's assessments.

Contrary to respondent's repeated assertions (Br. 20, 23, 59, 62, 64), the Tax Court based controlling findings on the expert testimony. The Tax Court recognized the error in section VI of its original opinion, struck that section (see revised opinion Pet. Br. App. 1a-29a, R. 495-497), and based at least these findings on such evidence:

> "The segment of petitioner's business which was conducted both within and without the District of Columbia consisted of the manufacture of a certain number of automobiles and kindred products without the District and the sale thereof to customers within the District. The net income from this segment of petitioner's business was earned by a series of transactions beginning with the manufacture of products in several states and ending with the sale to customers within the District. While the net income was not realized until sale, it was earned in part by manufacture of the products sold, including in addition to actual manufacture, procurement of material, financing, use of property and administration." (Finding 5, Pet. Br. App. 3a; R. 495.)

> "The method used by the assessing authority of the District attributed to the District 100 per centum of the net income derived by the petitioner from that segment of its business which consisted of the manufacture without, and sale of products within the District. The percentage thus determined was out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the District." (Pet. Br. App. 3a; R. 496.)

From the recitals above, it is immediately apparent that these findings are an almost perfect synthesis of the testimony of *all* the experts.[21]

Respondent attempts (Br. 55-59) to make something of the fact that the Tax Court added findings 3(b), 5

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[21] Petitioner's witnesses on one hand and respondent's on the other answered in opposite ways the hypothetical question—does the single factor of destination of sales measure income "fairly attributable" to the District. That disagreement was more apparent than real, as analysis shows, and to the extent it remains rests upon the untenable premises of respondent's witnesses (*e.g.*, that net income arises from sales alone, and not to any extent from manufacturing), from which they all retreated upon cross examination. Such premises are wrong in law as well as in fact, this Court having repeatedly stated that income is "derived from capital, labor or both combined", *Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415, and there is no support "for the conclusion that when a corporation manufactures in one State and sells in another, the net profits of the entire transaction, in a unitary enterprise, may be attributed, regardless of evidence, to either State", because "all the factors of that enterprise are essential to the realization of profits". *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 132-133. The Tax Court properly resolved the differences in its findings. ". . . [I]t is the very essence of the trial court's function to choose from among the conflicting and competing inferences and conclusions that which it deems most reasonable ... . Where, as here, the question turns largely on the testimony of experts, the trial court has the right to decide which set of experts . . . will be credited . . ." *Evans* v. *United States*, 319 F. 2d 751, 755 (1st Cir. 1963).

and 6, and struck out the portion of its opinion criticizing all the expert testimony, on motion of petitioner after the Court's original opinion had been filed. Actually, this strengthens those findings, since it demonstrates that they were very carefully reconsidered. Since they relate primarily to the constitutional questions, it is understandable that the Court, which did not consider these questions, overlooked the related findings in the first instance. The Tax Court said for instance:

> "The Court will add findings of fact 5 and 6, but not verbatim as asked in portion 'II' of petitioner's motion, but as the Court believes they should be stated *and as should have been made in the original findings of fact.*" (R. 492.) (Emphasis added.)

The thrust of respondent's argument under section IV of its Brief (pp. 55-64), as well as in the final passage of section III (p. 54) is that it is impossible to apportion income with ultimate precision, and thus whatever formula is applied, a taxpayer cannot prove that the income attribution is unreasonable and arbitrary, leaving the respondent's determination as final. This Court, in *Hans Rees' Sons, Inc.* v. *North Carolina,* 283 U.S. 123, 134-135, flatly rejected any such argument, declaring that it was not necessary "to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina" in order to determine that the amount taxed was excessive. To demand such precision is to make every formula immune to attack since resort to formulas is justified on the ground that absolute precision is impossible. See petitioner's brief, pp. 38-41. Respondent's argument

here is one often advanced by those determined to uphold arbitrary assessments regardless of evidence: since precision is impossible, the assessments are not subject to attack by showing (even gross) inaccuracies; but the taxpayer's demonstration is irrelevant because it is imprecise.

By the best measures available, the District has taxed eleven times the income derived from petitioner's District business activities (Pet. Br. p. 43). No conceivable degree of imprecision could dislodge that enormous disparity. Suppose it were only ten times, or six, or four and a half as in *Hans Rees'*?

Petitioner recognizes that it has the burden of proving excessive taxation and has done so. It has not, as respondent suggests (Br. p. 58), merely shown that different apportionment formulas would produce a different tax effect. It showed the source of its income in its activities almost all outside the District; it showed the best measures of the relative contributions of activities within and without the District; it showed that respondent's method had no tendency at all to find and measure the source; and it showed that, in this case, there was not even a coincidence between respondent's attribution and petitioner's acceptably accurate computations.

A Valid Formula Must Recognize the Contribution of Activities Outside the Jurisdiction

Respondent's points that petitioner's activities outside the District are of no concern to the District (Resp. Br. 37), and that location of factories is irrelevant because the District is not taxing factory locations (Resp. Br. 47), make no point at all. The problem is to find a measure of the income attributable to

activities in the District. Since that has to be done by fractions, with District figures in the numerators, the outside factors must be included in the denominators.

Respondent in this argument is apparently trying to assimilate the District's net income-based tax to a gross receipts tax, since it cites *General Motors Corporation* v. *Washington*, 377 U.S. 436 (Resp. Br. 38). The tax there involved was imposed on gross receipts of transactions having local incidents. It had nothing to do with determination of where net income arises or with apportioning net income for the purposes of a tax based on net income. It has long been established that taxes measured by gross receipts, like sales and use taxes, may be imposed upon transactions having local incidents. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534. *General Motors Corporation* v. *Washington* merely broadened the definition of "local incidents" within that rule.

In contrast, a net income-based tax is not in any sense a transaction tax, but, being imposed upon or measured by net income, depends for its validity upon the locale of the derivation of the income. It has been the uniform position of this Court, from *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, through *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 462-463, that such a tax satisfies due process if, and only if, it is so *apportioned* that it "reached, and was meant to reach" only "that portion of taxpayer's net income which arises from its activities within the taxing state", *i.e.*, "the profits earned by the processes conducted within its borders."[22]

[22] The quotations are from *Underwood, supra*, 254 U.S. at 121, and *Northwestern States, supra*, 358 U.S. at 464. To like effect, see *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 132-134.

The gross receipts tax in *General Motors* v. *Washington, supra,* was acknowledged by the majority of this Court to be an *unapportioned* tax (377 U.S. at 448); that is, all the gross receipts from every sale transaction within the state were taxed, without regard to the locale of the commercial activity producing the products sold.[23] By the same reasoning, a tax the effect of which is to attribute to the District all the *net profits* derived from activities culminating in sales to District customers is unapportioned. Thus, the court below erred in its view (R. 511-517) that the present formula, by merely dividing sales geographically, accomplished an apportionment of the net income. See Pet. Br. pp. 23, 35. Washington did not tax sales to customers outside the state, either.

Respondent contends (Br. 45) that "this Court has sustained the use of similar single-factor formulas inherently comparable to that adopted by the Commissioners of the District of Columbia." It has been demonstrated at pp. 33-34, 45-48 and App. F, p. 57a, of petitioner's opening brief that the decisions cited and the formulas involved therein are not at all comparable and would, in fact, if applied here produce very little if any tax for the District. We have found no decision of this Court or of any other jurisdiction which sustains an apportionment of net income by a ratio which, like respondent's formula, looks only to the destination of sale and takes no account whatever of the locale of the activities by which the income is produced.

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[23] As Mr. Justice Brennan pointed out in dissent, an "apportionment" contemplates consideration of "the commercial activity within the State, and not the sales volume" (377 U.S. at 450-451). The majority did not disagree with his concept of an apportionment, but only with its necessity in the case of a gross receipts tax on transactions having local incidents.

Respondent states (Br. 45) that "the District is not alone in apportioning income on the basis of a sales factor formula." The tabulation on page 119 of the Congressional study, which respondent cites, shows four jurisdictions as using the single factor of sale, but only three can be identified in the more detailed breakdown at pages 116-117 thereof. In addition to the District, they are Iowa and Missouri. In practice, however, those states have been able to confine the tax base to net income reasonably related to in-state activity, and hence no litigation on the validity of their formulas appears to have developed. The statutory formula in Iowa is based on sales of goods "sold and delivered within the State", and not on customer situs as in respondent's destination sales formula.[24] The Missouri statute is based on 100% of intrastate sales and 50% of interstate sales[25] (as were the District's November 28, 1947 regulations, discussed at pp. 13-14, *supra*). Both the Iowa and Missouri laws expressly prescribe that, where the sales formula is inequitable, different methods are permissible.[26] In practice, Missouri, at least, freely allows a manufacturer to use the generally accepted formula of property, payroll and sales.[27]

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[24] Iowa Code Ann. § 422.31(1). It is clear from the regulations thereunder that only certain *intrastate* sales are included in the numerator of the formula, which thus has some tendency to limit the tax to local activity. CCH Iowa Tax Rep. ¶ 12-432 (pp. 1201-1202).

[25] Mo. Rev. Stat. § 143.040.

[26] Iowa Code Ann. § 422.33(2); Mo. Rev. Stat. §§ 143.040(2), 143.080.

[27] CCH Mo. Tax Rep. § 11-505 (pp. 1244-1245), ¶ 11-515 (p. 1252).

In its insistence upon the single factor of destination of sales, therefore, the District stands quite alone.

Respondent says (p. 58): "Unless the fact of manufacturing is of such importance as to require that any formula for the apportionment of General Motors' income must include factors which will, in some manner, weigh manufacturing, the District's formula . . . is not subject to rejection . . ." We are glad to accept that challenge, and to rely upon the established fact, as well as common sense, of the "unless" clause word for word. *Since* any formula for the apportionment of a manufacturer's income *must* include factors which will weigh (or at least coincide with) manufacturing, the District's formula *must* be rejected.[28]

While there may be differences of opinion on details of the factors, and their content, in any apportionment formula, it seems obvious, and the record conclusively proves, that the major portion of a manufacturer's net income finds its "source" in, and is "fairly attributable" to, those jurisdictions in which it carries on its production activities. The fact that an absolutely precise determination is impossible does not excuse the application of a destination sales formula which makes no attempt at all to measure income-producing activities and assigns 100% of the income to the location of the customer, regardless of where the taxpayer's activities are carried on, and thereby pro-

[28] In this same sentence respondent refers to the District's formula as being "based . . . upon General Motors' 'trade or business' in the District." This assumes that sales to District customers are "trade or business" in the District. Even if such an assumption were correct, it does not comport with the statutory (and constitutional) requirement that income be apportioned to "trade or business *carried on or engaged in* within the District"—*i.e.*, to activities within the District.

duces a result "out of all reasonable proportion to the trade or business carried on" at the customer location. The Tax Court's formula is consistent with the statute, recognizes the contribution of manufacturing to petitioner's income, and makes a fair apportionment.

CONCLUSION

The Tax Court found that the assessments failed to limit the measure of the tax to the portion of petitioner's income fairly attributable to business done in the District, as required by the statute. The Tax Court also found as a fact, based on "a record which overwhelmingly sustains the Tax Court's findings",[29] that the tax was "out of all reasonable proportion to the trade or business carried on or engaged in by petitioner within the District"—a finding which, if it had been necessary to reach the constitutional issue, would have compelled the conclusion that the tax was unconstitutionally imposed. The double taxation, which was another fact found by the Tax Court, was clearly attributable to the District's unreasonable "formula", which thus imposed an unconstitutional burden upon interstate commerce. Nothing in the decision of the Court of Appeals or in respondent's brief effectively refutes the Tax Court's conclusions.

In the absence of a valid and applicable apportionment formula prescribed by regulations, it was the power and duty of the Tax Court, exercising its discretion as an administrative agency,[30] to "determine

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[29] Dissent of Judges Danaher, Miller and Bastian in the court below (R. 528-530).

[30] See *District of Columbia* v. *Brady*, 109 U.S. App. D.C. 324, 326, 288 F. 2d 108, 110.

the amount of the net income which is fairly attributable to the District . . . by use of such formula as the Tax Court deems best suited for determination of that question in this case." *District of Columbia* v. *Gallant, Inc.*, 110 U.S. App. D.C. 202, 205, 290 F. 2d 745, 748.[31] The formula which it found "best suited" was one which has had wide acceptance among the states and which is recognized as meeting constitutional standards by providing a reasonable and fair measure of the net income which arises from activities within the taxing state.

The Tax Court's action was in all respects proper and should be sustained. The judgment of the Court of Appeals should be reversed and the decisions of the Tax Court reinstated.

Respectfully submitted,

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[31] See also *District of Columbia* v. *Gallant, Inc.*, 113 U.S. App. D.C. 92, 305 F. 2d 761 (second appeal); *District of Columbia* v. *Southern Railway Co.*, 107 U.S. App. D.C. 285, 277 F. 2d 84. See D.C. Code 1961, § 47-2403.

APPENDIX

Hearings Before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia, Congress of the United States, Eightieth Congress, Second Session, on Methods of Acquiring Additional Revenue through Taxes and Other Means (March 18 - May 13, 1948)

Testimony of Vernon E. West, Corporation Counsel, and George C. Updegraff, Assistant Corporation Counsel (pp. 103-105)

Mr. Updegraff. Well sir, I will have to elaborate a little further on that, on the subject of apportionment.

Under the various income tax laws throughout the States, there have been devised systems of allocation and apportionment of income. The reason for that is this: If the State has the power to impose a tax, then the question is: What part of the income of any corporation or individual has its source within the taxing jurisdiction?

So that if the business is separately conducted within that jurisdiction, there is no trouble. That is what is termed "separate accounting," for example.

But if the business is a unitary business, which must depend upon activities in various jurisdictions, then the question of apportionment arises, and you must have a formula.

What goes into the formula is more or less left up to the taxing jurisdiction.

Now, some States have various factors. Some States only have one. In the District of Columbia, under the apportionment formula, the principal and, I should say, sole formula used with respect to unitary businesses was the sales factor. There are other factors, such as manufacturing costs, the value of property used in the business, the amount of pay rolls, and the cost of sales.

Well, there is very little if any manufacturing done in the District of Columbia. Most of the business is derived from sales. So there is a good reason for using the sales factor.

If that factor is unsatisfactory, under both the apportionment formula of the 1939 act and under the 1947 act, the taxpayer can come in and show to the assessor that the amount apportioned or allocated to the District of Columbia is unfair, and he will use different factors, or he will even use a separate accounting method if the taxpayer can show that he is entitled to such a method of computing the income.

Senator Cain. Let us use that Baltimore firm, just as a case. Would it be your habit and that of the District officials, to sit down with whoever the proper authority or official was within that Baltimore concern and say, "Look, let us try to figure out what proportion of your business is actually done within the District of Columbia, and we will pay you accordingly"?

Or did you just send them a bill for taxes as a result of the District's own determination, and then, if the business being taxed took exception to the proportion being assessed against them, have them come over to the District and sit down and try to iron out whatever the differences may have been?

Mr. Updegraff. I don't recall. I don't know what the actual fact was with respect to the administrative proceeding before the assessor; but I do know that under the regulations in the formula then in effect, the taxpayer had the right to do just that.

Senator Cain. I am just troubled in my own mind about how this thing works in a practical sense. I understand your position. It is understandable. You think that every out-of-city corporation doing business ought to be charged for that proportion of its business which is done within the

District. But I should think on the basis of this apportionment, ther would be hundreds of businesses having their domicile o side the District and doing business in the District, a out which the District officials would not know anything.

And so, you would necessarily be taxing some people whom you knew were doing business; but as to others who were conducting a lot of business by mail, how would you figure that out?

Mr. Updegraff. May I elaborate on that a little bit, Mr. Chairman?

Senator Cain. Well, please. And I trust you do not take exception to any of these questions, because we are merely trying to understand an unusual situation.

Mr. Updegraff. Not at all.

With respect to the apportionment of income, the intention is to allocate and apportion certain portions of the income of the taxpayer within the jurisdiction where the income is earned.

Now, it may be a certain percentage in one State and a larger percentage in another; as it was in the case known as the *Hans Rees case,* a North Carolina case, reported in 283 United States Reports. That case involved a leather manufacturer who had its principal plant in North Carolina and had a warehouse in New York City and did business all over the world and throughout every State in the Union.

The North Carolina tax under the allocation and apportionment theory was based solely on the property factor; 89 percent of the income, as I recall. The Supreme Court said it was unreasonable. And the court said that the other jurisdictions were entitled to more of a portion. In other words, North Carolina got more than fair share. And the court said that the allocation and apportionment formula used in that case was unreasonable.

That is *Hans Rees Incorporated* v. *North Carolina* (283 U.S. 123), at 131.

Then there is the question of: What is "doing business"?

Mr. West. Before you get off of that, I think I can clarify this and I think I am correct in my statement: If for example, a company sells goods in the District of Columbia manufactured outside of the District of Columbia, from which it makes a net profit of $100,000, let us say, we don't treat that whole $100,000 profit as being taxable in the District of Columbia. Because part of that profit was earned by the manufacturer, and only part of it by the sale.

So under our system or formula, half of the profit would be allocated to the District of Columbia and half elsewhere.

Is that not correct, Mr. Updegraff?

Mr. Updegraff. That is correct.

Regulation of November 28, 1947, placed in the record of the hearings at pp. 117-118

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
EXECUTIVE OFFICES,
Washington 4, D. C., November 28, 1947

Ordered

That regulations pertaining to income and franchise taxes promulgated August 28, 1947, under authority of title XVI, article I, of the District of Columbia Revenue Act of 1947 (Public Law No. 195, 80th Cong.), approved July 16, 1947, are hereby amended as follows:

Add to section 10-2(d), subsection (1), the following subsections:

"a. Income derived from the sale of tangible personal property shall be deemed to be income from sources within the District where title to the property sold passes from

the seller to the purchaser within the District. Title passes within the District when the goods are shipped in any manner whereby title is retained in the seller until the goods are delivered within the District; ordinarily, such is the case when goods are shipped into the District (a) C.O.D.; (b) on bill of lading with draft attached; (c) under an installment or conditional sales contract; (d) consigned to the seller or its agent; (e) to a warehouse for delivery therefrom; (f) in delivery equipment of seller; (g) by contract carrier employed by seller; (h) f.o.b. Washington, D. C.; (i) freight or other cost of transportation paid by seller; (j) where the consignee assumes no obligation to purchase goods until resold by him or until sometime subsequent to their receipt by him. There may be cases where the seller and buyer arrange for shipment of goods into the District in a manner inconsistent with one or more of the foregoing examples, such as where a seller ships the goods f.o.b. a point outside the District but pays the freight or cost of transportation to the buyer in the District. In such cases the agreement between the parties governs as to the place where title passes to the goods sold. If a taxpayer claims that title to the goods sold passes outside the District under the terms of an agreement, a copy of such agreement (if in writing) must be furnished to the Assessor with the return, together with typical forms used in making shipments.

"b. The total income derived from all sales made in such a manner that title to the goods sold passed within the District from the seller to the buyer is income from sources within the District, regardless of whether the seller was or was not engaged in business within the District during the taxable year.

"c. The percentages appearing in the following table show what part of the total gross income derived from sales made under the various circumstances stated therein is deemed to be fairly attributable to business carried on

or engaged in within the District and gross income from District sources and is therefore subject to the tax. In order that the taxable gross income to be reported in the return of the corporation may be computed correspondingly there shall be included in the numerator of the fraction in the apportionment formula 50 percent or 100 percent, whichever is indicated in the table as appropriate, of the total amount of sales made under each of the classes of circumstances listed below:

"(A) Where the sale was of goods delivered from stock located in the District:

(1) to the buyer in the District, 100 percent;

(2) to the buyer outside the District—

(a) and title to the goods sold passed within the District from the seller to the buyer, 100 percent.

(b) and title to the goods sold passed outside the District from the seller to the buyer and if the sale resulted from personal solicitation made by the seller or his agent in the District and/or the order for the goods or the contract of sale (written or unwritten) was accepted in the District, 50 percent.

"(B) Where the sale was of goods delivered from stock located outside the District:

(1) to the buyer in the District in such manner that title to the goods sold passed in the District from the seller to the buyer, 100 percent.

(2) to the buyer in the District and title to the goods sold passed outside the District from the seller to the buyer and if the sale resulted from personal solicitation made by the seller or his agent in the District in the course of a trade or business en-

gaged in or carried on within the District and/or the order for the goods or the contract of sale (written or unwritten) was accepted in the District in the course of a trade or business engaged in or carried on within the District, 50 percent."

By order of the Board of Commissioners, District of Columbia.

G. M. Thornett
Secretary of the Board.